No. 3669

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH ROSENTHAL,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH E. BIEN,
JNO. B. CLAYBERG,
Attorneys for Plaintiff in Error.

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Statements of Case.

A. RECORD AND PROCEDURE.

Joseph Rosenthal was indicted jointly with Maurice Rosenthal and Arthur F. Fitch, on two counts, viz.: In count one it was alleged that on or about November 10, 1919, at Sacramento, within the jurisdiction of the district court, then and there being the defendants

> "did then and there unlawfully, willfully, knowingly and feloniously *buy and receive thirty-nine* cases containing five thousand cigarettes each, of the value of $1,462.50 in lawful money of the United States, and which said thirty-nine cases of cigarettes had theretofore

> been unlawfully stolen, taken, and carried away from said railway car of the Southern Pacific, to-wit, car C. E. & I, 35132",

by M. H. Young and F. W. LaVeque; that the said thirty-nine cases of cigarettes at the time they were stolen, taken, and carried away

> "constituted a part of a shipment of freight in Interstate Commerce over the lines of railroad of the said Southern Pacific Company",

and consigned by John Bollman & Company of San Francisco, California, to divers consignees, all residents of Portland, Oregon, concluding as follows:

> "That at the time and place of aforesaid defendant then and there well knew that the said thirty-nine cases, containing five thousand cigarettes each had been, therefore, willfully stolen, taken and carried away from said railway car, as aforesaid" (Tr. p. 3).

The second count charges that said defendants on or about the 10th of November, 1919, did then and there unlawfully, willfully, knowingly and feloniously received and have in their possession, knowing the same to have been stolen from freight car of the Southern Pacific Company, to-wit: car C. E. & I, 35132, certain goods and chattels, to-wit: thirty-nine cases containing 5000 cigarettes each of the approximate value of $1,462.50,

> "which goods and chattels were then and there a part of the Interstate Shipment of freight over the lines of the railroad of said Southern Pacific Company, and were then and there in transportation over said line of railroad"

from John Bollman & Company of San Francisco, California, to various persons "all of Portland, Oregon, in Interstate Commerce" (Tr. p. 4).

A trial was had and a verdict rendered finding all three defendants not guilty on the first count of the indictment, and Maurice Rosenthal and Arthur F. Fitch not guilty in the second count but finding plaintiff in error guilty thereon (Tr. p. 7). Judgment was rendered and sentence imposed by the court upon the plaintiff in error under said verdict (Tr. p. 7). Motion for a new trial was made in his behalf which was overruled by the court (Tr. p. 9), and the record was sent up for review.

It is perhaps proper to say, that, upon the present attorneys being employed for plaintiff in error, an examination of the record of the case disclosed that a writ of error had already been issued upon the application of the then attorneys for plaintiff in error, but was based solely upon an assignment of error as to the refusal of the court to grant a new trial. The present attorneys for the plaintiff in error, within the time allowed by the statutes of the United States, applied for the issuance of a second writ based upon an assignment of error sufficient to warrant a consideration of the case by this court upon all points counsel desired to raise.

This practice was followed in accordance with the decision of the United States Circuit Court of Ap-

peals, Fourth Circuit, in the case of Gould v. United States, 205 Fed. 883.

Returns were made to both writs of error and the cases properly docketed in this court; the case on the first writ of error being No. 3638 and on the second No. 3669. By stipulation, approved by the Hon. Wm. H. Hunt, Circuit Judge, but one record was printed, viz.: that in No. 3669, and it was agreed that No. 3638 should not be argued but should abide the final disposition and No. 3669, the case now on hearing.

B. TESTIMONY.

At the trial of the case, after the government had introduced several witnesses as to the shipping of these cigarettes and as to the number delivered to the consignees, it was stipulated in open court that these particular 39 packages were shipped on car C. E. I 35132 over the lines of the Southern Pacific Company in Interstate Commerce; that the same were stolen or removed from this car somewhere between Roseville and Gerber, California, and that they were stolen on or about November, 1919, or October, 1919 (Tr. pp. 33 and 34).

The trial proceeded after the above admission, and disclosed the following facts:

Sometime in September W. H. Young and F. W. LaVeque, who were then employed by the Southern Pacific Railway Company, came into the store of the Pacific Sales Company at Sacramento, and

offered a large quantity of cigarettes for sale. These two men were acting under assumed names as follows: Witness Young under the name of McAllister and witness LaVeque under the name of Burke. They offered the cigarettes at $6.00 per thousand, and the general manager in charge of the store would have nothing to do with them. They came around the next morning and offered them for $5.00 per thousand, whereupon the manager telephoned to Maurice Rosenthal, owner and proprietor of the Pacific Sales Company Store, who advised the manager to purchase the cigarettes if everything appeared all right and to pay for them out of the cash register. Shortly thereafter these two men again appeared for the purpose of selling another lot of cigarettes; the manager again communicated with Mr. Maurice Rosenthal, who wrote a letter under date of October 1st to the manager, in which he said:

> "We want to make sure that those cigarettes are not stolen and that the men have a title to the goods, as I do not desire to buy stolen goods no matter at what profit we can make on the same."
>
> "If you feel assured that the men have obtained these goods legitimately, telephone us and we will forward check for the amount, but if you have any doubt on the subject let him take his goods back as I do not want to get mixed up with any disreputable proposition."

To this letter the following P. S. was added.

> "If the party you purchased these cigarettes from is willing to sign an affidavit or even this

> letter, that the goods have been purchased by him, and that there is nothing owing for the cigarettes, or in other words if he has a clear title to the same, have him sign this letter and return same to us."

At the bottom of this letter appears the following:

> "I have a clear title to these cigarettes.
> (Signed) F. W. Burke" (Tr. p. 63).

Witness LaVeque or Burke, as he was known in the store, signed this last statement and afterwards received a check for $1040 for the cigarettes (Record 64).

The transcript further shows that other transactions were had between Burke and the Pacific Sales Company, and that the cigarettes so purchased were always delivered to the Pacific Sales Company at its store in Sacramento and paid for by the check of Maurice Rosenthal.

Along about October 30th, Young and LaVeque again called at the store and indicated that they had a large number of cigarettes for sale. They were notified that Mr. Joseph Rosenthal would be at Sacramento on the next day and to come in and see him about the matter. Joseph Rosenthal appeared the next morning and they met him and had a conversation relative to the cigarettes involved in this indictment. Joseph Rosenthal stated that he would have a written contract for the same drawn and they should come in sometime during that after-

noon and sign the same. Joseph Rosenthal then went to lunch, at which time he called up Maurice Rosenthal and had a conversation with him in which he was advised that if he believed the cigarettes were all right to enter into a contract which should provide for a division of the payments, as the amount would be something about $11,000. Joseph Rosenthal dictated a contract before he returned to the store, thereafter Young signed the same (this contract appears in record at pages 57 and 58). It is dated October 31, 1919, and states as follows:

> "I, F. W. Burke, residing at Gerber, California, citizen of California, United States of America, agree to sell to the Pacific Sales Company, located at 6th and L Streets, Sacramento, California, two and one-half millions of cigarettes composed of the following brands: Camels, Lucky Strike and Chesterfields. The price of the same to be $4.50 per thousand. Delivery on same to be one-third on November 1st, 1919, and the balance within fifteen days. Terms and payments on same to be as follows: One-third payable December 1, 1919, one-third payable December 15, 1919, and one-third payable January 1, 1920.
>
> "The seller F. W. Burke guarantees the cigarettes to be in first class salable condition. He also guarantees that these cigarettes were not obtained in any illegal manner or in violation of any federal, state or local law or statutes, and gives to Pacific Sales Company a clear bill of sale to same with each delivery. In the event of F. W. Burke having a larger quantity of cigarettes than stated of the above brands he agrees to deliver and the Pacific Sales Company

to accept the same on the basis of four dollars and fifty cents ($4.50) per thousand."

"F. W. Burke further agrees to deliver these cigarettes f. o. b. to the Pacific Sales Company at 6th and L Streets, Sacramento.

(Signed) F. W. Burke."

Endorsed on the contract we find the following language:

"I accept the above for the Pacific Sales Company.

(Signed) Joseph Rosenthal."

It must be remembered that only the cigarettes purchased and sold under this contract are involved in the indictment. All the other dealings between the Pacific Sales Company, and these two thieves were introduced in evidence evidently for the purpose of showing the prior transactions between the parties.

The testimony of Mr. Young in connection with the theft of the cigarettes involved in the indictment is somewhat interesting. He says that they were stolen from the cars from the Southern Pacific Train on the 8th of November, 1919, and delivered to the Pacific Sales Company on the 10th of that month, which shows conclusively that at the time the contract was made they had no cigarettes in their possession and expected to be able to steal the same in time to enable them to make the delivery as agreed in the contract (Tr. p. 41).

It conclusively appears from the testimony that all the cigarettes, both those dealt in prior to the

contract and afterwards under the contract, were delivered to the Pacific Sales Company at its store in Sacramento. We take it that there will be no controversy about this, and that it is unnecessary to further refer to the transcript to substantiate this assertion. It will be further noticed that Burke and McAllister did not try to conceal the delivery of any of these cigarettes; they appeared in the store openly, and awaited the payment of the money from Maurice Rosenthal, in each instance of the delivery. It would uselessly extend this brief beyond proper bounds to quote the testimony found in the record setting forth these facts.

When the contract was signed Mr. Young was present and objected to the terms of payment as specified therein. He insisted upon only two payments, and when this was suggested, he stated that he and Mr. Burke must be absolutely honest about this transaction, because they are willing to wait so long for the payment of the goods (Tr. p. 12).

It must be conceded by counsel for the government that the Pacific Sales Company was merely a trade name adopted by Maurice Rosenthal who was operating some eleven stores in different cities of California; that he was the sole owner of the business, and that Joseph Rosenthal was merely employed by him as purchasing agent, having no interest of any kind in the business. Mr. Maurice Rosenthal testified directly as to this as follows:

> "His business is a wholesale furniture and general chain of stores; that the name of his business is Maurice Rosenthal, and that he does business under the name of the Pacific Sales Company and Sales Stores; that the Pacific Sales Company is owned by him as sole proprietor. He knows Joe Rosenthal, his son. Knows Mrs. Lewis, Mr. and Mrs. Fitch. They were all his employees" (Tr. p. 133).

No evidence of any kind contradictory to the above was offered by the government and its attorneys did not cross-examine Mr. Rosenthal relative to the above testimony.

The testimony further shows that it was the duty of Joseph Rosenthal (plaintiff in error) as purchasing agent for Maurice Rosenthal, to go to each of these eleven stores at least once every month for the purpose of determining what further stock had to be bought. 39 cases of the 42 shipped were delivered by Young and LeVeque at the Pacific Sales Company store, and Maurice Rosenthal paid to them several thousand dollars on the purchasing price thereof. The officials of the United States, found a copy of the above contract on the street in the town of Lincoln, Placer County, California. They arrested Young and LaVeque for the theft of these cigarettes. They were indicted and pleaded guilty, but a very significant circumstance appeared, viz.: they had not been sentenced at the time of this trial. In ordinary contemplation this would mean that the government had offered them some leniency at least, if they would testify fully at the trial of this action,

and it is presumed that the extent of such leniency would be measured somewhat by the character of the testimony they should give at the trial.

Joseph Rosenthal testified that he never had seen any of the cigarettes which were purchased and delivered under the contract (Tr. p. 132). He further testified that he believed all these cigarettes came through purchases by Young and LaVeque from the government; that he saw some of the cigarettes in the store at Sacramento, which had been purchased by the general manager thereof prior to same contract, and noticed that some of the packages were marked *"P I E R" and "W A S H"*; that he asked Mr. Burke or LaVeque, if these cigarettes were government cigarettes; that he don't remember the answer made to that question "but from the way I got it, I was under the impression at that time that they were out of the same lot" (Tr. p. 121). La Veque testified that Joseph Rosenthal was looking over the packages in the store one day and said: "Where did you get them, were they assigned to a steamship company in Seattle"? That Joseph Rosenthal figured that they were perhaps government cigarettes, but did not give Burke a chance to answer, and that Burke did not volunteer; that Rosenthal just happened to say something about a steamship company in Seattle and said he figured that they were government cigarettes (Record p. 60).

Specifications of Errors.

The court erred in giving and entering judgment on the verdict herein because:

(a) The second count of the indictment states no crime under the statutes of the United States. (Asssignment of errors 1 (a).)

(b) Acquittal of all the defendants on the first count in the indictment was tantamount to their acquittal upon the second count. (Assignment of errors 1 (f).)

(c) There was no testimony sufficient to warrant defendant's conviction on the second count of said indictment. (Assignment of errors 2 (bcde).)

(d) There was no evidence introduced of plaintiff in error's guilt under said second count.

(e) The verdict is inconsistent and void. (Assignment of errors 1 (g).)

(f) All the evidence introduced at the trial was at least as consistent with the innocence of defendant as with his guilt. (Assignment of errors 1 (h).)

The court erred in refusing to grant the defendant a new trial because:

(a) The second count of the indictment states no crime under the statutes of the United States. (Assignment of errors 2 (a).)

(b) The acquittal of all the defendants on the first count of the indictment was tantamount to their acquittal on the second count thereof. (Assignment of errors 2 (f).)

(c) The record contains no testimony sufficient to warrant a conviction of defendant on the second count of said indictment. (Assignment of errors 2 (bcde).)

(d) There was no evidence introduced of plaintiff in error's guilt under said second count.

(e) The verdict is inconsistent and void. (Assignment of errors 2 (g).)

(f) All the evidence introduced at the trial is at least as consistent with the innocence of the defendant as with his guilt. (Assignment of errors 2 (h).)

Argument.

I.

ACQUITTAL ON FIRST COUNT TANTAMOUNT TO ACQUITTAL ON SECOND.

By the rendition of the verdict whereby the jury acquitted all of the defendants under the first count of the indictment, such verdict became tantamount to an acquittal of all defendants under the second count thereof, and, the court had no jurisdiction to enter a judgment against and impose a sentence upon plaintiff in error.

As above stated the indictment was returned under Section 7927, Barnes Federal Code, which provides that whoever "shall buy or receive or have in his possession" any goods and chattels described in the Act, *knowing them to be stolen,* shall be

guilty, and upon conviction be fined not more than $500 or imprisoned not more than ten years or both.

These cigarettes were admitted to have been stolen from the Southern Pacific Railway by these two men, Young and LeVeque, who were then employed by that company (Tr. pp. 55-54). It must be remembered that the indictment confined itself in the first count to the charge that defendants *bought and received* the cigarettes *knowing them to be stolen* from an Interstate Shipment. The elements of the crime charged therefore were four in number, viz.: First, that the said defendants bought said cigarettes. Second, that they received the same. Third, that they had been stolen, and Fourth, that defendants had knowledge of such theft.

In order that the government might convict defendants or either of them under the first count of the indictment, all of the above elements of the crime must be found beyond a reasonable doubt. The jury refused to find either of the defendants guilty under the first count. We must therefore start with the proposition, that under this verdict the defendants were not guilty of: First, buying the cigarettes knowing them to have been stolen. Second, receiving the same, knowing them to have been stolen. The testimony was conclusive on the proposition that these cigarettes were bought by Joseph Rosenthal, acting in behalf of the Pacific Sales Company (Tr. pp. 11-6-133). Second, that the same were received by the general manager of the Pacific Sales Company (Tr. (Young) pp. 39-41; (LaVeque) pp. 57-58,

and (Contract) pp. 57-58). Therefore, the verdict of the jury on the first count can only be sustained upon consideration that the jury found that none of the defendants knew that the cigarettes had been stolen.

The crime attempted to be charged under the second count of the indictment relates to the same cigarettes as mentioned in the first count, and the same transaction is involved therein as in the first. If none of the defendants knew the cigarettes had been stolen none of them could be convicted under either count of the indictment.

Again briefly rehearsing the testimony: That of Mr. Young (Tr. pp. 34-35) and LaVeque (Tr. pp. 54-73), witnesses for the government, discloses that for two months prior to the transaction upon which the indictment was based, they had been selling stolen cigarettes to the Pacific Sales Company, all of which were paid for either in cash by said company or by checks of Maurice Rosenthal, the owner of said company.

About the last of October, 1919, these men came to the store of the Pacific Sales Company to dispose of another large quantity of cigarettes. They were informed by those in charge of the store that Mr. Joseph Rosenthal (plaintiff in error) would be in Sacramento the next day. They saw him the next day and LaVeque entered into a contract to sell to the Pacific Sales Company about two and one-half millions of cigarettes at $4.50 per thousand.

Joseph Rosenthal is conceded to have had no interest in the Pacific Sales Company. He was merely an employee of Maurice Rosenthal the sole owner and proprietor of said company. It is also conceded that Joseph Rosenthal was the purchasing agent for Maurice Rosenthal. All the cigarettes in question were delivered to the Pacific Sales Company, according to contract, at its store in Sacramento, and whatever money was paid to Young and LaVeque was the money of Maurice Rosenthal. This seems to be conceded by counsel for the government.

The jury, as we have demonstrated, found by their verdict that none of the defendants knew these cigarettes had been stolen at the time they were bought and received. This being true how was it possible for the jury to conclude as they did that Joseph Rosenthal knew they had been stolen when they were received and passed into his possession (we shall contend later that they never were delivered to Joseph Rosenthal and never passed into his possession). These two findings are not only inconsistent with but diametrically opposed to each other. If none of the defendants knew the cigarettes were stolen when the same were bought and received, as charged in the first count, such want of knowledge conclusively prevails as to the allegation of the second count.

As a matter of fact the jury must have been, unconsciously perhaps, very careless to say the least, or they would not have rendered such a verdict. By their verdict they found that none of the defendants

knew these cigarettes were stolen at the time they were purchased (October 31), and at the time they were received (about November 10th), and yet they found that Joseph Rosenthal knew they were stolen at the time of delivery and the receipt of their possession. It would be impossible for the jury to have found him guilty under the second count, had they paid the slightest attention to the evidence introduced before them. There is absolutely no testimony even tending to show that any of these cigarettes were ever received by him and no testimony even tending to show that he ever had the same in his possession. By the contract of purchase the cigarettes were to be delivered to the Pacific Sales Company. They were so delivered. He never saw any of them, according to the uncontradictory testimony, until after the government officials took possession of them. All this in addition to the fact that the jury had found by their verdict as to the first count that none of the defendants knew the goods were stolen when they were purchased and received.

Joseph Rosenthal was not interested in the Pacific Sales Company but was a mere employee of Maurice Rosenthal, the owner and proprietor of said company; therefore, it cannot be argued that a delivery to and receipt of possession by the Pacific Sales Company, was a delivery to and receipt of possession by Joseph Rosenthal. As a matter of fact the jury, after acquitting all of the defendants on the first count, probably felt that some one should be made the "goat" in the transaction and thus, carelessly,

without considering the effect of their verdict on the first count, and with no consideration of the evidence as detailed above, concluded that, inasmuch as he was the "youngest man of the crowd", he would suffer less by conviction than any of the others. They seemed to forget that by this verdict they cast a cloud upon the character of this young man which never could be removed, if the verdict was enforced. We cannot avoid saying that probably the verdict came about through the fact that the then attorneys for the defendants paid very little attention to the case and did not do their duty, when they refused to argue the same to the jury. If any argument had been made, calling attention to the fact that he was the least guilty of all the defendants, and that none of the cigarettes were ever received by him or came into his possession, the jury would undoubtedly have hesitated and upon a proper consideration of all the evidence, would have acquitted him on both counts.

The case of Edwards v. United States (266 Fed. 848), clearly illustrates our position on this point.

Edwards was indicted on three counts, viz.: 1. With stealing six bales of hay belonging to the government. 2. With stealing six bales of hay which has theretofore been furnished for military services, and 3. With applying to his own use property of the United States heretofore furnished for military service.

A verdict was rendered of not guilty on the first and second counts and guilty on the third.

While the court reversed the case because the third count was insufficient in that the property was not sufficiently described therein it says:

> "This verdict to say the least was contradictory and inconsistent."

Judge Knapp filed a concurring opinion in which he says:

> "When Edwards went to take the hay he either believed it had been abandoned or he did not so believe. If it had been abandoned, the taking was innocent and he was not guilty of stealing it or of 'knowingly' applying it to his own use. If he did not believe the hay had been abandoned the taking was felonious and he was guilty of stealing it. The finding of the jury that he was not guilty of stealing it was therefore in effect a finding that he believed the hay had been abandoned and this left no basis for the charge of applying it to his own use. To 'knowingly' apply it to his own use implies that the property was either stolen or entrusted to defendant, manifestly the hay was not entrusted to him nor did it come rightfully into his possession except on the theory that he believed it had been abandoned. The jury found that he did not steal it and it follows that he did not commit the offense of which he was convicted."

II.

WANT OF ANY EVIDENCE TO SUSTAIN VERDICT AGAINST JOSEPH ROSENTHAL.

In approaching the discussion of this point, we first desire to call the court's attention to a distinguishing characteristic between our position and that involved where the *sufficiency* of the evidence

is in question. We insist that the record contains *no evidence* in anyway showing or even tending to show that plaintiff in error was guilty of the crime of which he was convicted. No question is here involved concerning the *weight* of evidence but only that there is no evidence. The determination by this court that the evidence is insufficient, ordinarily raises a question of the weight to be given to the evidence by the respective parties; that is a question of fact. Where the point is made that the record contains *no* evidence, there is nothing to weigh and the question becomes one entirely of law.

Isbell v. United States, 227 Fed. 788, and cases.

If the record contains no evidence of the commission of the crime charged in the second count of the indictment, there was nothing for the jury to consider or pass upon and consequently the verdict must be vacated. To illustrate: Suppose an indictment charging murder in the first degree; and suppose the record contains no evidence of the *corpus delicti*. As a matter of law a verdict of guilty should and would be set aside at once whenever the attention of the court was called to the condition of the record. If one is convicted of a crime without evidence to support the conviction, it would be a reproach to the law to incarcerate the defendant.

III.

INSUFFICIENCY OF SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT.

We are aware of the rule of this court and other United States courts of appeal that in order to properly raise the question of insufficient or want of evidence to support a judgment, a motion must be made at the close of the testimony introduced in behalf of the plaintiff, and a renewal thereof at the close of the case, and an exception to the ruling of the court be entered, and that unless the question is thus properly raised on the record, an appellate court will not consider the same. The record herein contains no such motions or exceptions. We insist, however, that the rule above announced has no application to the case at bar under the circumstances disclosed by the record.

The indictment was against three defendants, Maurice Rosenthal, Joseph Rosenthal and Arthur F. Fitch, jointly, and above stated, consisted of two counts: First, the buying and receiving of the cigarettes in question knowing them to have been stolen, and second, receiving and having the cigarettes in their possession knowing them to have been stolen.

The evidence that Joseph Rosenthal, plaintiff in error, bought the cigarettes in question as purchasing agent for the Pacific Sales Company, which Maurice Rosenthal alone owned, and that same were delivered at the store of that company; that Fitch, the general manager of that company, received the same in behalf of the company, and that they were,

after such delivery, always in possession of such company, seems to be conclusive. It appears that Maurice Rosenthal made payments on them in accordance with the contract executed in behalf of the Pacific Sales Company by plaintiff in error as purchasing agent, until he was informed that they had been stolen. It therefore appears from the record that there was evidence introduced by the government at least tending to establish the charges in the first count, which, if unexplained, might have been sufficient to sustain a conviction of each and all said defendants under the same. Therefore no motion to direct a verdict for want or insufficient evidence could possibly have been sustained at the close of plaintiff's testimony.

By the uncontradicted testimony introduced in behalf of the defendants it was disclosed that the Pacific Sales Company was a mere trade name and that its business and property was owned and conducted solely by Maurice Rosenthal, who made all payments on the cigarettes in question; that plaintiff in error was simply an employee of Maurice Rosenthal, viz: purchasing agent; that Fitch was merely the general manager for him in the store at Sacramento; that neither plaintiff in error or Fitch had any interest in the business, but both were simply employees of Maurice Rosenthal. The transcript contains not one word of testimony in any way contradicting the above. Counsel for the government treated this testimony of Maurice Rosenthal as conclusive. They not only introduced no

testimony in any way tending to contradict it, but did not cross-examine the witnesses in relation to the same. That it is true, therefore, must be conceded, and it must further be conceded that the jury accepted it as true.

No motion was made at the close of the case to acquit the defendants because of insufficiency or want of evidence. The defendants were acting for each and all of the defendants, and presumably they fully realized that in so far as Maurice Rosenthal was concerned, there was evidence sufficient to go to the jury on both counts of the indictment, and feared the effect upon this case of a motion of that kind being made in behalf of plaintiff in error or Mr. Fitch.

It is very apparent from the record that this case was not carefully or closely tried by the attorneys for the defendants. It seems that they felt sure of an acquittal and made no effort to protect their clients should the result be to the contrary. This is apparent from the fact that they refused to argue the case to the jury and announced themselves satisfied with the charge of the court. Unfortunately their confidence in an acquittal was badly shattered by the verdict, which found plaintiff in error guilty on the second count of the indictment.

It would seem harsh treatment to hold that because of the carelessness and negligence of his attorneys in not properly raising the question of the

insufficiency or want of evidence, that plaintiff in error should forever be branded as a criminal and be incarcerated in the penitentiary.

But there is an exception to the rule above announced which must be enforced with the same strength and vigor as the rule itself. It is established by the Supreme Court of the United States and various federal appellate courts that, where a criminal case comes up for review, in which the life or liberty of a person is involved, the court will consider errors, even without the suggestion of counsel and without any exception being shown in the record, or bills of exception, or assignments of error. This exception was first announced and applied by the Supreme Court of the United States in the case of Wiborg v. United States, 163 U. S. 632, as follows:

> "No motion or request was made that the jury be instructed to find for defendants or either of them. When an exception to a denial of such motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency, and although this question was not properly raised, yet if a plain error was committed in a matter so vital to defendant, we feel ourselves at liberty to correct it."

The Supreme Court has since that decision followed the rule there laid down.

> Hains v. United States, 182 U. S. 485, and other cases.

This rule and exception has probably received more special attention in the federal courts of appeal than in the Supreme Court. For instance in Ayala v. United States (268 Fed. 296), in which the defendant made a motion to dismiss the case because of lack of evidence at the conclusion of the government's case. He then introduced testimony only of his good character, and did not renew his motion after the close of the evidence.

The court says:

> "The general rule is that, if the defendant after the denial of his motion to direct a verdict at the close of the government's testimony, introduces testimony in his own behalf, he thereby waives his motion, and it is his duty to again renew his motion after all the evidence is closed. But notwithstanding this rule, the Supreme Court has held that where a plain error has been committed in the trial of a criminal case, it will be considered by the court, although a motion for a directed verdict has never been made."

In the case of Sykes v. United States (204 Fed. 909) the court says:

> "Where the life or personal liberty of the accused is at stake, the courts of appeal may notice such a grave error as the absence of substantial evidence to sustain the conviction where the question was not properly raised in the trial court."

And again in the same case the court further says:

> "The defendant in this case must not be unlawfully deprived of his liberty for five years

> without proof of his guilt beyond a reasonable doubt, much less without any substantial evidence of it, and this court sit in silence and perpetuate such injustice."

In McNutt v. United States (267 Fed. 670) the defendant was arrested for carrying on the business of a retail liquor dealer without having paid his license tax. When the case was called he appeared and pleaded not guilty. The court asked him if he wanted an attorney and he said that he did not. He made no objections to any of the proceedings or testimony introduced, but testified that he did not sell any whisky, because it was all taken away from him. After conviction he employed an attorney who prepared an assignment of error, sued out a writ of error, furnished a brief and argued his case for him. The United States attorney urged, because there were no objections or exceptions to any of the evidence or to any of the rulings of the court at the trial, there was nothing to review, and asked that judgment be affirmed.

The court says:

> "Such is undoubtedly the general rule, but there is an exception to it as firmly established as the rule itself. It is that in criminal cases, where the life or liberty of the citizen is at stake, the courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical error which appears to have seriously prejudiced the rights of the defendant, although the questions they present were not properly raised or preserved by objections, exceptions, request, or assignment of error."

In Fielden v. United States (227 Fed. 862) the court says:

> "It is the general rule of the Supreme Court and of this court, that the appellate court does not consider the question whether or not there was substantial evidence to sustain the verdict in the absence of a motion or request for an instructed verdict by the defeated party at the close of the trial, and an exception to its denial. There was no such motion, request or exception in this case, and counsel for the government object to a consideration of the evidence and invoke this rule. There is, however, an exception to the rule to the effect that in a criminal case, where the life or liberty of the citizen is at stake, the appellate court may, in the interest of justice, examine the evidence to see whether there was any substantial evidence whatever against the accused, and if none is found, may reverse the judgment, although no motion or request was made on that ground, and no exception was taken or assignment of error made."

See also

Moore v. United States (224 Fed. 95);
Bandy v. United States (224 Fed. 98);
Taylor v. United States (219 Fed. 670).

We insist that the instant case is one to which the above exception should be applied. Here a young man, under the age of 24 years, stands branded as a criminal, and has been sentenced to incarceration in the federal penitentiary for a year and a day, upon the verdict of a jury; the record is not only barren of any evidence even tending to show that he was guilty of the crime charged, but

presents uncontradicted evidence that, in all his doings with reference to the crime charged, he acted only as an employee, never receiving or having had in his possession any of the cigarettes. In fact he never saw any of them until they were seized by the government officials.

IV.

THE VERDICT WAS INCONSISTENT AND CONTRADICTORY.

The verdict finds that plaintiff in error *did not know* that the cigarettes had been stolen at the time they were bought and received. It also finds that plaintiff in error *did know* that such cigarettes had been stolen at the time they were received and passed into his possession. These findings were made upon the same identical evidence.

A finding that plaintiff in error knew that the cigarettes had been stolen was necessary to convict him under either count. The trial was had on both counts and the jury found upon a consideration of all the testimony, both that plaintiff in error *knew* and *did not know* that they had been stolen.

The findings are diametrically opposed to each other and effect cannot be given to both. It seems unnecessary to quote authorities on this proposition, as it is "Hornbook" law, that is, an inconsistent and contradictory verdict cannot stand.

We refer, in this connection, to point one of this brief, where the matter here involved is quite fully discussed.

V.

THE EVIDENCE DISCLOSES THAT IT IS AT LEAST AS CONSISTENT WITH INNOCENCE AS WITH GUILT.

Under such circumstances the same is insufficient to sustain a verdict.

Isbell v. United States (227 Fed. 788);
Chambers v. United States (237 Fed. 513);
Clyatt v. United States (197 Fed. 207);
Scroggin v. United States (255 Fed. 285);
Tucker v. United States (224 Fed. 833);
Harrison v. United States (200 Fed. 662);
Union Pacific Coal Co. v. United States (173 Fed. 737).

We submit that the judgment should be reversed and the court below directed to discharge plaintiff in error.

We feel that a great injustice has been done our client. It appears clearly from the record that he was not defended with the aggression and care to which he was entitled. At the time of the transaction for which he was indicted, he had not reached the age of 23 years. He occupied a very responsible position—that of purchasing agent for eleven stores belonging to his father—and doubtless he was ambitious in his efforts to make his employment successful, yet he was very careful with reference to this particular transaction. With full knowledge of all the purchases of cigarettes theretofore made by the manager of the store from these two thieves, he did not close the deal in question until he had communicated with his father in San Francisco.

We have directed the attention of the court to the fact that the record contains no evidence even tending to show that our client ever received or had any of the cigarettes in his possession, and that the jury found both ways on the question of his knowledge; that they were stolen.

A careful examination of the record discloses that our client was the least guilty of the three defendants indicted. Maurice Rosenthal owned the entire business of the Pacific Sales Company. His manager received and had in his possession for Maurice Rosenthal and with his knowledge, all the goods in question, yet Maurice Rosenthal and Mr. Fitch were found not guilty on both counts of the indictment while our client who was a mere employee of Maurice Rosenthal and who only purchased the cigarettes after communicating with his father, and who never received any of them or had them in his possession, is found guilty and sentenced to one year and one day in the penitentiary.

Dated, San Francisco,
April 25, 1921.

JOSEPH E. BIEN,
JNO. B. CLAYBERG,
Attorneys for Plaintiff in Error.